Supreme Court, U.S.
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No. 03-442

In the Supreme Court of the United States

CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.,
PETITIONERS,

v.

UNION PACIFIC RAILROAD COMPANY, UNITED TRANSPORTATION UNION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the Ninth Circuit erred by holding, consistent with the legislative history and every other court of appeals that has considered the question, that an "essentially local safety hazard" subject to State regulation under 49 U.S.C. § 20106 is a hazard not "capable of being adequately encompassed within uniform national standards."

(2) Whether the Ninth Circuit correctly determined that the State's regulation governing track strength on a particular 10.5 mile stretch of track in the California mountains was not "necessary to eliminate or reduce an essentially local safety hazard."

RULE 29.6 STATEMENT

Respondent Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation.

Burlington Northern Santa Fe Corporation is the indirect parent company of respondent The Burlington Northern and Santa Fe Railway Company.

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STATEMENT OF THE CASE

1. Regulatory Background

The Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 *et seq.*, was enacted in 1970 to ensure that all "laws, regulations, and orders" relating to railroad safety "shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106.[1] The FRSA ordered that the Secretary of Transportation "*shall* proscribe regulations and issue orders for *every* area of railroad safety" to supplement the then-incomplete body of federal rail safety regulations. 49 U.S.C. § 20103(a) (emphasis added). Existing State laws and regulations could remain in force "until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106. Once federal rules "cover[] the subject matter," however, the FRSA expressly preempts State law unless three prerequisites are met. To survive preemption, the State rule (1) must be "necessary to eliminate or reduce an essentially local safety hazard"; (2) must not be "incompatible with a law, regulation, or order of the United States Government"; and (3) must not "unreasonably burden interstate commerce." *Id.*

The Federal Railroad Administration ("FRA") is the agency within the Department of Transportation principally responsible for rail safety. The FRA has promulgated hundreds of federal rules regulating railroad operations. *See* 49 C.F.R. pts. 200-266 (2002). This petition concerns State authority to regulate track strength. It is undisputed, however, that FRA rules already "cover" the subject matter

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[1] The petition asserts (at Pet. 3 n.3) that this case is governed by the former 45 U.S.C. § 434 rather than the current 49 U.S.C. § 20106. The Ninth Circuit (Pet. App. A-9) and the district court (Pet. App. B-11) applied the current statute because the relevant language is identical, and petitioners do not suggest that the difference would matter in any respect.

of track design and strength, including the particular, well-understood dangers associated with track design and construction in mountainous terrain. *See generally* 49 C.F.R. pt. 213. As the district court properly held, "[i]t is clear that federal regulations substantially subsume the subject of track safety standards," and "specifically address track strength at curves." Pet. App. B-24.

Recognizing that varying local conditions may require different construction techniques, FRA has principally chosen to enforce its track geometry specifications with "performance based" standards. For example, each 39-foot segment of track must have "[a] sufficient number of crossties which in combination provide effective support that will (i) [h]old gage within the limits prescribed in § 213.53(b); (ii) [m]aintain surface within the limits prescribed in § 213.63; and (iii) [m]aintain alinement within the limits prescribed in § 213.55." 49 C.F.R. § 213.109(b)(1). Those performance-based rules are supplemented by specific requirements, which are more stringent for "curved track with over two degrees of curvature." 63 Fed. Reg. 33,992, 34,006 (June 22, 1998); *see also* 49 C.F.R. § 213.109. Similarly, track must be fastened to crossties "by a system of components which effectively maintains gage within the limits prescribed" for different classes of track. 49 C.F.R. § 213.127.

Although designed to make the substance of rail safety regulation nationally uniform "to the extent practicable," the FRSA anticipated a "close working partnership" between FRA and the States by assigning responsibility for the "day to day surveillance and inspection necessary for the effective enforcement of the Act" to certified State inspectors. 116 Cong. Rec. 34,579, 34,579 (1970). State agencies with regulatory authority for rail safety are invited to "participate in" the FRA's investigative and surveillance activities, and to report violations to FRA. 49 U.S.C.

§ 20105. States file annual reports with FRA detailing the scope of their inspection activities under the state participation program, and the results of the State's investigation into any accident or incident. *Id.*

The FRSA therefore expressly contemplates that States will monitor the strength and condition of rail at any sites of particular concern to State regulatory authorities. If State regulators believe that track or roadbed construction at a site is insufficient to maintain the track's gauge and other characteristics under load within the federally-specified safety parameters, they are invited to report that violation of the federal performance-based standards to the FRA. Moreover, States are permitted to institute enforcement proceedings in federal court unless DOT objects. 49 U.S.C. § 20113.

FRA has also recognized that safe railroad operation in mountainous terrain involves many factors beyond the structural integrity of the track. FRA accordingly analyzed the hazards of grade and curvature to identify every "heavy grade" area in the country for the purposes of mandating certain special braking devices in these areas. 49 C.F.R. § 232.23 (2000); 62 Fed. Reg. 278, 281, 288, 292 (Jan. 2, 1997); *see also, e.g.*, 49 U.S.C. § 20141(c)(4) (mandating additional braking equipment for "heavy grade" terrain). FRA emphasized that a uniform definition of "heavy grade" was necessary to prevent inconsistent safety standards in the many areas of the country where such conditions are present. 62 Fed. Reg. at 281; *see also* R.E. 982, 984 (depicting heavy-grade areas on multi-state routes).[2] FRA has also regulated the speed on every single curve in the country, based on multiple factors including the degree of

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[2] R.E. citations refer to the Appellants'/Plaintiffs' Record of Excerpts filed in the Court of Appeals.

curvature and the height of the outside rail. *See* 49 C.F.R. § 213.57.

FRA has also recognized that derailments on heavy grade curves may be caused by a constellation of interrelated "track-train dynamics" ("TTD") issues, including train length and the distribution of light and heavy cars. FRA decided in 1982 not to mandate TTD rules, noting its conclusion that other forms of regulatory oversight would be safer and more efficient. *See* 47 Fed. Reg. 32,817, 32,818-19 (July 29, 1982); R.E. 706-19. Under FRA's oversight, railroads used guidelines developed in a joint FRA/industry program to develop their own TTD operating rules. R.E. 695; R.E. 216-17; R.E. 100-01; R.E. 777. FRA requires railroads to submit those rules to FRA for review, to conduct sufficient training to ensure that their TTD operating rules are understood, and to conduct compliance testing to ensure that those rules are followed. *See* 49 C.F.R. pt. 217. State inspectors help to monitor the railroads' compliance with these TTD operating rules.[3] In addition, FRA requires training programs that will ensure that engineers can handle "severe grades," including the "management of in-train force levels attendant to poor distribution of empty and loaded cars in train consists." 54 Fed. Reg. 50,890, 50,897 (Dec. 11, 1989); *see also* 49 C.F.R. §§ 240.123-25.

2. Federal and State Responses to the Dunsmuir Accident

In 1991, a rail car containing metam sodium fell 30 feet from a bridge over the Sacramento River after derailing at a 14-degree curve called the "Cantara Loop," on the Southern

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[3] The district court and the Ninth Circuit determined that State enforcement of the railroads' TTD rules is not a subject "covered" by federal regulations. Pet. App. A-27, B-13 to B-17. That issue is not presented here.

Pacific Transportation Company's Shasta Line near Dunsmuir, California. The tank was punctured, and metam sodium (which was not then designated as a hazardous material by DOT) spilled into the river, killing fish and plant life. FRA advised Congress that the "short-term effect[s]" were "devastating," but that "metam sodium is not a persistent chemical and the animal and plant life in the river began restoring itself within a matter of weeks." R.E. 759.

As the Ninth Circuit recognized, the 1991 Cantara derailment was caused by track-train dynamics issues, not the condition of the track itself. Pet. App. A-5. After a 3-year investigation, petitioner California Public Utilities Commission ("CPUC") concluded that "light empty railcars . . . at the head-end of the train . . . were pulled off the inside radius of the Cantara Loop by the heavier loaded railcars behind them causing the train to derail." *Id.* CPUC specifically concluded that "the condition of the track at the site of the derailment was not a causative factor in the derailment." R.E. 835, 842.

Congress held two hearings on the Dunsmuir accident. FRA assured Congress that it was working closely with Southern Pacific to ensure that operations over the Dunsmuir track were conducted safely. The agency explained that it was reviewing "recent modifications" to Southern Pacific's TTD rules "to see if they effectively deal with the problem that was presented at the Cantara Loop on July 14." *Train Derailments and Toxic Spills: Hearing Before the Government Activities and Transp. Subcomm. Of the House Comm. on Government Operations*, 102d Cong. 256 (1991) ("*Train Derailments*") (statement of Grady Cothen, Associate Administrator, Safety, FRA). FRA also "worked with [Southern Pacific] on revisions to the grade of its track at Cantara and . . . confirmed that the curve was smoothed so that the grade transition would be more uniform and reduce the . . . forces that contribute to

derailments." R.E. 165. The responsible FRA official provided undisputed testimony in this case that FRA was satisfied with the corrective action taken by Southern Pacific. R.E. 164-65. FRA also declined to endorse a suggestion made at the hearings that States should be given greater authority to regulate the railroads' operations in the California mountains because States should work with FRA as "partners" through the "State participation program," and FRA wants problems "to be addressed in a uniform manner" when they "cut across State lines." *Train Derailments*, 102d Cong. at 270.

The federal hearings on the Dunsmuir accident culminated in legislation that required DOT to conduct a safety assessment of routes with "significant grades or high degrees of curvature" nationwide. *See* Rail Safety Enforcement and Review Act § 16(4), Pub. L. No. 102-365, 106 Stat. 972, 981 (1992). The California senator who sponsored the legislation explained that a federal study was required because the derailment risks encountered on rail lines in the California mountains were "national in scope." 138 Cong. Rec. 23,306, 23,314 (1992) (statement of Sen. Seymour).

Not content to participate as FRA's partner in the federal program, the California legislature instead directed CPUC to conduct its own state-wide survey to identify "local safety hazard[s]," giving consideration to "[t]he severity of [the] grade and curve of track," and to adopt regulations "to reduce potential railroad hazards" at those sites. Cal. Pub. Util. Code. §§ 7711(d), 7712; *see also id.* § 765.5(a).

CPUC decided to designate as an "essentially local safety hazard" any site where "the presence of some physical feature increases accident risk." R.E. 282, 414. CPUC used two methods to initially identify such locations: (1) a statistical method, which identified those areas of track

on each rail line that had experienced the most derailment accidents *on that line* between 1976 and 1991 (R.E. 271, 416); and (2) an "operational" method, which designated those sites "within mountain grade territory where the Railroads have imposed special operating requirements, under certain conditions, to counter the risks of operating on steep grades" (R.E. 416). Both of CPUC's methodologies simply identified the lengths of track with the steepest grades and sharpest curves on every major rail line in California—where, naturally, derailments tend to be more common than on the straight, level portions of each line. (Indeed, there is a striking overlap between the "heavy grade" sites identified by FRA and CPUC's "local safety hazard" sites. *See* R.E. 855, 853.)

CPUC initially designated 29 locations, covering more than 450 miles of track, as posing "essentially local" safety hazards. Prior to its September 1997 final order, CPUC decided to "impose no remedial action" at ten of those sites because the (nationally uniform) "new federal regulations on [braking] devices cover[ed] the subject matter of the staff's proposed recommendations" regarding the supposedly "local" hazards there. R.E. 417.

The remaining 19 sites that were the subject of the CPUC regulations challenged in this case covered 300 miles and approximately 4.2% of all track in the State. Pet. App. A-6 n.1; R.E. 272; R.E. 853. CPUC mandated an intricate scheme of State rules regulating the operations and equipment of interstate trains traveling over those sites. *See* R.E. 264-441. Under these "local safety hazard" regulations, CPUC asserted authority over the configuration of virtually every train that crosses the California border and mandated special training for thousands of railroad employees. R.E. 67, 114-15; Pet. App. B-20 to B-22. The courts below grappled with the intricacies of those regulations and held that many of them are

preempted by federal law or violate the Commerce Clause. Petitioners do not, however, seek review on any of those issues.

The only issue raised in the petition is the validity of a CPUC rule relating to track strength at Site 9, a stretch of rail near Dunsmuir California that includes the Cantara Loop. CPUC's 1997 final order requires Union Pacific[4] to "preserve and maintain" the "track structure strengthening" measures that Southern Pacific undertook in 1983-84 because a Southern Pacific employee testified to CPUC that track structure improvements (in combination with other measures) had reduced derailments there. *See* Pet. 4 n.7; R.E. 439, 356-57. CPUC asks this Court to review the Ninth Circuit's conclusion that this 1997 order was not "necessary to eliminate or reduce an essentially local safety hazard." 49 U.S.C. § 20106.

Here it is essential to clear up several serious factual mischaracterizations in the petition. First, the petition asserts in a footnote that California is now "concerned with strengthening the track only in the immediate vicinity of the curve called the Cantara Loop, a less than one-half mile area." Pet. 8 n.18. But the only "essentially local safety hazard" actually designated by CPUC's 1997 order—and the only such hazard actually considered by the district court and the Ninth Circuit in this case—was the entirety of Site 9, which is a *10.5 mile* stretch of track encompassing 70 different curves. *See Rulemaking on Comm'n's Own Motion to Provide for Mitigation of Local Rail Safety Hazards Within Cal.*, Decision No. 97-09-045, R.93-10-002, 75 CPUC2d 1, 1997 Cal. PUC LEXIS 888 at 197-99, 263-64 (Sept. 3, 1997), *see also* R.E. 1124-25.

The petition then erroneously asserts that 32 out of 90 derailments on the Southern Pacific's Shasta Line between

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[4] Union Pacific merged with Southern Pacific.

1976 and 1991 "occurred at this curve." Pet. 11. In fact, the undisputed record evidence shows that there were only *two* derailments at the Cantara Loop in that period (one in 1976, and one in 1991), despite the fact that over 150,000 trains crossed the Cantara curve in that time. R.E. 878, 881. The other 30 incidents referenced by the petition happened at other curves within Site 9—curves that California now claims not to be "concerned with" at all. *Id.*

The petition's exquisitely careful word choice hopes to avoid technical falsehood, but its objective is clearly to suggest a remarkable confluence of dangers at one spot. After claiming those 32 derailments at "this curve," it goes on to assert that "*the curve* was the sharpest mainline curve in the state," that "sharp curve and steep grade created a direct link to one-third of the derailments at *the site*," and that "[a]ll of these factors were located *at* a bridge crossing the upper Sacramento River." Pet. 11 (emphasis added); *see also id.* at 20. These rapidly shifting levels of generality are designed to attribute 10.5 miles worth of (relatively minor) derailments over a 16-year period on this heavy grade terrain to a single curve. It is also undisputed that there was a dramatic reduction in derailments at this Site, and in rail operations throughout the nation, after the mid-1980s due to dramatic improvements in technology and infrastructure. R.E. 1032-33, 1057.

Second, in a similar vein the petition attempts to paint as extraordinary the fact that the Cantara Loop is near a bridge crossing the Sacramento River. Without diminishing the extraordinary importance of safety around major waterways and population centers, the record clearly establishes that there is nothing "essentially local" about that problem. To the contrary, there are more than 10,000 miles of track in North America constructed adjacent to waterways. Major rail lines have always followed rivers when possible, "in order to take advantage of the natural,

moderate gradient the rivers carved through the hills." R.E. 1025. And there are more than a thousand miles of "heavy grade" track in this country adjacent to bodies of water or towns. R.E. 79-80, 1124-28. The United States filed an *amicus curiae* brief in the Ninth Circuit supporting respondents, pointing out that "all major rail lines carry hazardous materials and run close to rivers, population centers, and businesses." Brief for the United States as Amicus Curiae at 10 (Aug. 30, 2001). And a California congresswoman pointed out at the Dunsmuir hearings that the train that derailed at the Cantara Loop in 1991 had, "[b]etween its starting point near Los Angeles and the point of the spill in northern California, . . . crossed 141 bodies of water." *Adequacy of Laws and Regulations Governing Rail Transp. of Hazardous Chems.: Hearings Before the Government Activities and Transp. Subcomm. of the House Comm. on Government Operations*, 102d Cong. 2 (1991).

Third, the substance of CPUC's actual 1997 order regarding Site 9 was that certain 1983-84 track structure improvements must be "preserve[d] and maintain[ed]" absent consent from CPUC staff. But the undisputed record evidence shows that those improvements in fact "no longer exist" because the track "was completely rebuilt by Union Pacific in the fall of 1997." R.E. 62. Similar improvements have been made at other mountain-grade sites in the railroads' system. R.E. 59. After the 1991 accident Southern Pacific also permanently reduced the grade at the 14-degree Cantara Loop curve from 2.28 percent to less than one percent. Pet. App. A-11 n.9; R.E. 165, 879. There have been no derailments of any type at the Cantara Loop in the 13 years following the 1991 accident. R.E. 878.

Finally, it is completely undisputed that the 1991 Cantara Loop derailment—the only accident at that curve since 1976—had nothing to do with the condition of the track. To the contrary, CPUC specifically concluded that

"the condition of the track at the site of the derailment was not a causative factor in the derailment." R.E. 835, 842.

3. Proceedings Below

Respondents filed this action against CPUC on October 9, 1997, contending that various aspects of the State regulatory scheme were preempted by federal law or impermissibly burdened interstate commerce. On cross-motions for summary judgment, the district court invalidated much of the State's regulatory scheme. *See* Pet. App. A-8 (summarizing district court decision). The district court concluded, however, that CPUC's track-structure rule for Site 9 was "necessary" to reduce or minimize an "essentially local safety hazard" and therefore not preempted. *Id.* at B-40 to B-42. The district court expressly declined to adopt the definition of an "essentially local safety hazard" that was advocated by the Secretary of Transportation at the time the FRSA was enacted, is referenced in the legislative history, and has been applied by every Circuit that has considered the issue. *Id.* at B-34 to B-37. The district court instead determined that Site 9 was an "essentially local safety hazard" on the basis of accident frequency statistics, the grade and curve, and the fact that the track crosses the Sacramento River. *Id.* at B-40 to B-41.

The Ninth Circuit reversed, explicitly adopting the interpretation of the savings clause urged by the United States as *amicus curiae*. The court of appeals stated that:

> Our sister circuits, which have plumbed the statutory history of the FRSA, have . . . created a workable definition of an "essentially local safety hazard," defining it as one which is not "adequately encompassed within national uniform standards."

Id. at A-13 (citing cases). The court of appeals held that the district court had erred by "relying solely on the frequency with which a hazard occurs;" instead, "the word 'essentially'

requires us to inquire into the hazard itself to determine whether it is the type of hazard that is properly dealt with on a local level." *Id.* The Ninth Circuit also quoted this Court's decision in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945), for the proposition that "matters of local concern" are those, "which, because of their number and diversity, may never be adequately dealt with by Congress." *Id.*

Applying that standard, the Ninth Circuit concluded that there is nothing "essentially local" about the hazards identified at Site 9. The court recognized that the fact that Site 9 has a higher derailment risk than the rest of the Shasta Line "is, itself, unremarkable" because "all steep grades and sharp curves increase the risk for derailment." *Id.* at A-14 to A-15. The court of appeals also recognized that Congress held two hearings specifically on the 1991 Dunsmuir derailment, culminating in federal legislation directing DOT to study the adequacy of current federal regulations governing railroad operations on track with "significant grades or high degrees of curvature." *See id.* at A-16 n.12. "The FRA is aware of the particular dangers on steep grade/sharp curve tracks and has adopted regulations covering the track strength on these areas." *Id.* at A-15 to A-16.

The Ninth Circuit expressly declined to decide whether the unusual environmental sensitivity of a site could ever factor into the "essentially local safety hazard" analysis, because in this case there was clearly nothing "essentially local" about the environmental danger. *Id.* at A-16. The court of appeals recognized that the risks associated with the Sacramento River in Site 9 are not "fundamentally different from those of other locales," given that "more than 10,000 miles of track are adjacent to waterways in North America" and that "individuals dependent on their local

waterway in every case would be devastated should an accident occur." *Id.* at A-17.

The Ninth Circuit also agreed with the United States that "considering environmental consequences without looking to the hazard itself would allow a state to regulate the track strength or any other potential concern in tunnels and on bridges in every population center." *Id.* at A-16 to A-17. The court of appeals recognized that Congress plainly did not intend such a broad scope for State law: "This broad definition would effectively prohibit the FRA from ever being able to preempt state law, contrary to Congress's stated goal of uniformity in railroad safety to the extent practicable." *Id.* at A-17

REASONS FOR DENYING THE WRIT

The CPUC contends that the issue resolved by the Ninth Circuit is a question of "first impression." Pet. 16. If true, that would be reason enough to deny the petition. But the Ninth Circuit correctly realized that every court of appeals that has considered the issue has adopted the same definition of an "essentially local safety hazard" that it applied here. That definition is grounded in the language of the statute, conforms precisely to the legislative history of the FRSA, was contemporaneously endorsed by the federal agency with primary responsibility for rail safety, and indeed was urged by the United States as *amicus curiae* below. The Ninth Circuit's conclusion that the heavy grade risks associated with this 10-mile stretch of rail are not "essentially local" in nature is nothing more than fact-bound application of that properly stated law, and is in any event plainly correct.

Nor does the Ninth Circuit's holding conflict with this Court's decision in *CSX Transporation, Inc. v. Easterwood*, 507 U.S. 658 (1993). *Easterwood* held that an "essentially local safety hazard" under the FRSA is a risk "owing to unique local conditions." 507 U.S. at 675. This Court

rejected the more expansive interpretation of the local safety hazards clause forwarded by the plaintiffs in *Easterwood*, noting that it threatened to "completely deprive the Secretary of the power to pre-empt state common law, a power clearly conferred by" the FRSA. *Id.*

CPUC simply lifts some language about the importance of safety and "considerable solicitude for state law" from *Easterwood*, and argues that the Ninth Circuit gave insufficient attention to those values. But neither *Easterwood* nor this case were decided on the basis of such generalities. Like this Court in *Easterwood*, the Ninth Circuit instead grappled with the application of the FRSA's quite specific statutory preemption language and correctly concluded that the State law in question was preempted.

The petition identifies no conflict of authority or other issue meriting this Court's review. It should be denied.

I. THE PETITION IDENTIFIES NO CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER COURT

The FRSA's preemption provision expresses Congress's conclusion that rail safety regulations "*shall be* nationally uniform to the extent practicable." 49 U.S.C. § 20106 (emphasis added). It is accordingly unsurprising that every court of appeals that has interpreted that provision has concluded, like the Ninth Circuit here, that an "essentially local safety hazard" is one not "capable of being adequately encompassed within uniform national standards"—a formulation that is consistent with the statutory language and drawn directly from the legislative history of the FRSA. *See infra* at 18-21; *see, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11, 14-15 (3d Cir. 1976); *Norfolk & W. Ry. v. Pub. Utils. Comm'n of Ohio*, 926 F.2d 567, 570 (6th Cir. 1991); *Steva v. Soo Line R.R.*, No. 96-4198NI, 1997 U.S. App. LEXIS 17373 (8th Cir.

July 11, 1997) (unpublished). The petition does not allege a split, and could not.

Instead, the petition contends that the Ninth Circuit's holding conflicts with this Court's decision in *Easterwood*. In *Easterwood*, the plaintiff argued that a state common law negligence verdict relating to train speed at a grade crossing was not preempted by the FRSA. This Court squarely rejected that argument, explaining that an "essentially local safety hazard" was a risk "owing to unique local conditions," and that negligence law "is concerned with local hazards only in the sense that its application turns on the facts of each case." 507 U.S. at 675. This Court stressed that the more expansive interpretation of the savings clause urged by the plaintiffs "would completely deprive the Secretary of the power to pre-empt state common law, a power clearly conferred by" the FRSA. *Id.* *Easterwood* therefore contains no holding that could possibly help petitioners, and indeed strongly supports the consensus interpretation of the "essentially local safety hazards" clause that was adopted by the Ninth Circuit here.

The petition's argument for a conflict seems to rest on the view that: (1) the Ninth Circuit cited the Third Circuit's decision in *Coleman* approvingly, (2) a *different* passage in *Coleman* suggested that the FRSA evinces a "total preemptive intent" (542 F.2d at 13), and (3) *that* language from *Coleman* conflicts with language in *Easterwood* acknowledging that the structure of the FRSA displays "considerable solicitude" for State law. *See* 507 U.S. at 665. That reasoning is wholly unpersuasive.

First, the Ninth Circuit in this case never mentioned and certainly did not adopt the "total preemptive intent" language from *Coleman*. The Ninth Circuit cited *Coleman* only as one authority among many for the established law that an "essentially local safety hazard" is one not "capable

of being adequately encompassed within uniform national standards." Pet. App. A-13 to A-14.

Second, petitioners have misinterpreted the "total preemptive intent" language from *Coleman* itself. Here is the passage:

> State adopted regulations, *with the exception of those which are designed to eliminate an essentially local safety hazard*, are permitted to continue in force only until such time as a federal regulation covering the same subject matter is promulgated. We believe these statutory provisions evince, as the district court determined, a "total preemptive intent."

Coleman, 542 F.2d at 13 (emphasis added). The Third Circuit thus properly recognized that the FRSA completely preempts all State requirements on rail safety subjects "covered" by federal law *unless* the "essentially local safety hazards" exception applies. Petitioners' suggestion that *Coleman* adopted "'total' federal field preemption of state laws in railroad safety," Pet. 19, or anything like it, is plainly wrong.

Finally, this Court's comment in *Easterwood* that the FRSA displays "considerable solicitude" for State law is also more of an observation than a holding. The whole sentence was: "The term 'covering' is in turn employed within a provision that displays considerable solicitude for state law *in that its express pre-emption clause is both prefaced and succeeded by express saving clauses.*" *Easterwood*, 507 U.S. at 665 (emphasis added). In context, the "considerable solicitude" language is simply a comment on the existence of those savings clauses, not a substantive interpretation of them. And in fact this Court held in *Easterwood* that the FRSA preempts most (if not all) state law regulation of train speed at grade crossings, notwithstanding the savings clauses. *Id.* at 673-76, 675 n.15; *see also Norfolk S. Ry. v. Shanklin*, 529 U.S. 344, 347-49

(2000) (reaffirming that the FRSA preempts state regulation of the adequacy of warning signs or devices installed at grade crossings with federal funds).

The petition similarly claims that the Ninth Circuit's opinion conflicts with *Easterwood* and with congressional intent by holding "that uniformity in rail safety *regulations*, and not railroad safety, was Congress' paramount purpose in enacting the FRSA." Pet. 19. Of course the Ninth Circuit held nothing like that. The Ninth Circuit did not decide this case by balancing uniformity against safety in some abstract sense; it simply applied the express preemption clause that Congress wrote into the FRSA, and concluded that there was nothing "essentially local" about the risks the CPUC designed these particular track standards to address. Congress did consider the relationship between safety and uniformity when drafting the statute—but it concluded that the dichotomy urged by petitioners is entirely false. The FRSA did not require uniformity at the expense of safety; it required uniformity to promote safety. DOT told Congress in 1970 that the lack of uniform safety rules was one of the primary causes of rail accidents. *See Railroad Safety and Hazardous Materials Control: Hearings on H.R. 7068, H.R. 8168, H.R. 8941, H.R. 11480, H.R. 11516, H.R. 11573, H.R. 13572 and H.R. 15117 Before the Subcomm. on Transp. and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong. 39 (1970) (Testimony of John Volpe, Secretary of Transportation) ("*Volpe Testimony*").

Finally, the petition also obliquely claims a conflict between the Third Circuit's decision in *Coleman* and the Fifth Circuit's decision in *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570, 573 (5th Cir. 1987). *See* Pet. 15-16. While the Fifth Circuit did take issue with the "total preemptive intent" language of *Coleman*, petitioners concede that *Missouri Pacific Railroad* did not interpret the "essentially local safety hazard" clause at all.

Pet. 15 & n.35. And in any event, it bears repeating, the Ninth Circuit in this case did not endorse or even mention the Third Circuit's "total preemptive intent" dictum from *Coleman*.

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE STATUTE IS CORRECT

The Ninth Circuit's construction of the "essentially local safety hazards" exception was drawn directly from the legislative history of the FRSA. During the course of the hearings, the Secretary of Transportation was questioned on the meaning of the phrase "local safety hazard" as proposed by DOT. *See Volpe Testimony*, 91st Cong. 50-51. Secretary Volpe offered to submit a letter to the Committee so that Congress could "understand what the language we have determined here really means." *Id.* at 51. The Secretary's letter (*id.* at 51-53) advised Congress that the purpose of the language was to "enable the states to respond to local situations not capable of being adequately encompassed within uniform national standards" because "unique circumstances are not always amenable to broad Federal regulatory authority." *Id.* at 52. The House Report embraced the Secretary's formulation with some limited changes in wording. H.R. Rep. No. 91-1194, at 19 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4117 ("House Report") (substituting "individual local problems" for "local situations"). The United States' *amicus* brief below discussed the legislative history and squarely endorsed its construction of the "essentially local safety hazards" exception. Brief for the United States as Amicus Curiae at 14. Given the clarity of the legislative history and the agreement of the responsible federal agency, there is no justification for courts to apply any other definition, and no federal appellate court has done so.

The petition asserts that "[i]n relying on *Coleman* rather than *Easterwood*, the Ninth Circuit effectively

swallows the local safety hazard exception," Pet. 19, because "a literal interpretation of *Coleman's* 'capable' test means *possible* and it is possible to address any hazard through a national regulation, thus, entirely eviscerating the 'local safety hazard' exception." Pet. 18.

That is a straw man. Of course it would be literally possible for Congress to deal with every unusual local contingency through a sufficiently comprehensive and specific federal code. But no court—not *Coleman*, and certainly not the Ninth Circuit in this case—has ever endorsed the woodenly literal interpretation of the phrase "capable of being adequately encompassed within uniform national standards" that petitioners now attack.

The Ninth Circuit's opinion instead makes it clear that the issue is not whether a uniform federal approach is *literally* "capable" of addressing the hazard, but whether it is *practically* capable of doing so. The Ninth Circuit endorsed a pragmatic inquiry into whether the site poses "the type of hazard that is properly dealt with on a local level" (Pet. App. A-13)—"'safety concerns of a local rather than national character,'"[5] or concerns of a type "'which, because of their number and diversity, may never be adequately dealt with by Congress.'"[6] That approach harmonizes the "essentially local" savings clause with Congress's directive that all "laws, regulations, and orders" relating to railroad safety "shall be nationally uniform *to the extent practicable*." 49 U.S.C. § 20106 (emphasis added).

Petitioners protest that this consensus interpretation of the "essentially local safety hazards" clause "leaves no room at all for the States." Pet. 19. That is not true. Although

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[5] Pet. App. A-13 (quoting *Burlington N. & Santa Fe Ry. v. Doyle*, 186 F.3d 790, 795 (7th Cir. 1999)).

[6] Pet. App. A-13 (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945)).

"essentially local" hazards may be rare in the heavily regulated mainline track system,[7] the statutory and legislative history of the FRSA makes it clear that Congress anticipated State regulation of many "essentially local" safety hazards on the track of industrial and plant railroads outside the general rail system.

Congress passed the FRSA against the backdrop of decades of precedent from this Court recognizing the importance of that distinction. Indeed, Congress's choice of the phrase "essentially local" mirrors prior precedent from this Court recognizing that railroad operations over "standard gauge" track built in accordance with "standard railroad construction" had a "national character," and did not implicate any "essentially local" issues. *Piedmont & N. Ry. v. ICC*, 286 U.S. 299, 307-08, 311 (1932). By contrast, the Interstate Commerce Act did not assert federal authority over private industrial and plant railroads that did not share the characteristics of the general rail system, because that type of "industrial track" did not implicate issues of "national concern." *Tex. & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry.*, 270 U.S. 266, 277-78 (1926).

Congress decided in 1970 to extend federal regulation to industrial and plant railroads for the first time.[8] It therefore made perfect sense for Congress to include the

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[7] The United States explained its view that some local safety hazards could exist in the general rail system where, for example, "distinctive subsoil conditions . . . require extraordinary measures to strengthen and monitor track conditions," or "peculiar drainage problems caused by nearby heavy construction . . . require remedial measures to avoid washouts." Brief for the United States as Amicus Curiae at 24. "[U]nlike the grade and curve at the Cantara Loop, these are problems so localized and particular that they are unlikely to be the subject of uniform national rules." *Id.*

[8] *See* 49 U.S.C. § 20102 (defining "railroad" to include "any form of nonhighway ground transportation that runs on rails"); House Report, 1970 U.S.C.C.A.N. at 4114.

"essentially local safety hazard" exception to ensure that States would have residual authority to address the myriad of individual, local problems encountered in such operations. The House Report explained, for example, that the railroad industry has "very few local characteristics," with the "exception of industrial or plant railroads." House Report, 1970 U.S.C.C.A.N. at 4110.

In any event, CPUC's alternative interpretation of the "essentially local safety hazards" exception entirely nullifies Congress's intent that rail safety regulations should be "nationally uniform to the extent practicable." 49 U.S.C. § 20106. CPUC asserts that it "narrowly tailored" its local safety hazard designations, and then implies that it designated "only a half-mile location on the approximately 7,000 miles of mainline track in the state." Pet. 20. That will not withstand scrutiny.

The standard actually employed by CPUC labeled a hazard as "essentially local" whenever "the presence of some physical feature increases accident risk." R.E. 282; *see also* R.E. 414. Under that standard, CPUC initially designated 29 different sites—comprising 450 miles of track and more than a thousand different curves—as "essentially local" safety hazards. CPUC decided not to impose any new State requirements at ten of those sites because it recognized that new, nationally uniform federal regulations had already taken care of the supposedly "local" problems there. R.E. 417. But CPUC's remaining 19 sites still covered 300 miles and approximately 4.2% of all track in the State. Pet. App. A-6 n.1; R.E. 272; R.E. 853. The course of this litigation has narrowed the remaining dispute in this Court to the 10.5 miles and 70 curves of Site 9 (not, again, the Cantara Loop curve alone), but the CPUC's interpretation of the FRSA would in fact permit State regulation of every steep or curved stretch of track in California.

III. THE CPUC'S REGULATION IS NOT "NECESSARY" TO ADDRESS ANY "ESSENTIALLY LOCAL SAFETY HAZARD" AT THE DUNSMUIR SITE

The Ninth Circuit's factbound application of properly stated law to a 10.5 mile stretch of rail near Dunsmuir California would not merit review by this Court even if erroneous. It is, however, clearly correct.

The CPUC's argument that there is something so unusual about Site 9 that the hazards are "essentially local" rests on three characteristics: (1) the grade and curve of the track, (2) accident data showing that about a third of the derailments on the Southern Pacific's Shasta line from 1976 to 1991 happened there, and (3) the fact that the track crosses the Sacramento River. As the Ninth Circuit properly recognized, none of these factors identifies a "hazard" that is "essentially local" in nature. All in fact point to risk factors that are common throughout the national rail network.

There is nothing extraordinary about the prevailing grade of Site 9 or the arc of its 70 curves. The national rail network has more than 450 "heavy grade" sites in 31 States, and hundreds of miles of track at grades steeper than 2%. R.E. 79-80, 1124-28. And the grade at the Cantara Loop (now less than 1%) is no longer particularly steep by any standard. Although the petition accurately describes the Cantara Loop in Site 9 as the "sharpest mainline curve" in California, Pet. 20, the general rail system was built to allow for safe operations around 14-degree curves, and there are many other lines in the country with curves of 14 degrees or more. R.E. 1124-25. Some lines in other states have as many as eleven 14-degree curves with gradients as steep as 3%. *Id.* The FRA has extensively regulated track structure and railroad operating requirements in such terrain. Railroad experts with in-depth knowledge of the physical

traits of mountain grade territory throughout the country uniformly confirmed in this case that the CPUC has not identified any physical features in Site 9 that create operational risks uncommon to mountain grade terrain nationwide. R.E. 1026, 163-64, 145, 215. Indeed, the CPUC admitted that it never made any finding that the operational risks at Site 9 were materially different than the risks at the heavy grade sites designated by FRA throughout the country. R.E. 822.

The CPUC also relied on statistics showing that approximately a third of the derailments on the Shasta Line between 1976 and 1991 occurred within Site 9. Of course that statistical analysis proved nothing about Site 9's derailment history relative to the rail system as a whole, and also ignored the last six years of data in the record—which showed *no* derailments within Site 9 at all. In any event, the CPUC's data merely reflects the fact that Site 9 encompasses some of the most gradient terrain on the Shasta Line. As the United States explained below, "a disproportionate number of accidents will always occur in mountainous terrain, which is by definition characterized by sharp curves and steep grades." Second Brief for the United States as Amicus Curiae at 6 (Nov. 20, 2001); *see also, e.g.*, R.E. 78, 80-81, 1111-12 (confirming that railroads operating throughout the country experience higher derailment rates in mountainous areas). In a 1994 report to Congress, FRA explained that derailments "almost invariably . . . happened at a curve" and that "curves often form the overwhelming majority of route alignment in rugged terrain." R.E. 786. And the CPUC's statistical survey unsurprisingly identified increased derailment rates in the steepest segments of nearly all of the rail lines that cross the California mountains. *See* R.E. 828, 416, 464-90. The fact that accident rates predictably increase in steep,

curved terrain does not establish that that problem is not amenable to uniform nationwide solutions.

The Ninth Circuit expressly declined to decide precisely what role environmental sensitivity should play in the preemption analysis, because it properly recognized that there is nothing "essentially local" about the environmental challenges posed by Site 9. Pet. App. A-16 to A-17. As the United States explained below, "[t]he potential for catastrophic rail accidents exists in thousands of locations across the country because all major rail lines carry hazardous materials and run close to rivers, population centers, and businesses." Brief for the United States as Amicus Curiae at 10; *see also id.* at 19-20. There are more than 10,000 miles of track adjacent to waterways in North America, and the train that derailed at Dunsmuir in 1991 had already crossed water 141 times since leaving Los Angeles. *Supra* at 10. Obviously the need to cross the Sacramento River increases the risks of operating on this rail line, but those risks are quite common and national in scope. The Ninth Circuit correctly recognized that if the proximity of the river justifies State regulation at Site 9, the local safety hazard "exception" will swallow the rule—"allow[ing] a state to regulate the track strength or any other potential concern in tunnels and on bridges in every population center," and defeating "Congress's stated goal of uniformity in railroad safety to the extent practicable." Pet. App. A-17.

The petition does its best to make rail transportation of hazardous materials appear fraught with danger, but in reality it is far safer than any available alternative. Highways must cross rivers too, and trucks experience roughly ten times the accidents that trains do despite transporting similar volumes of hazardous materials. R.E. 89-91. Derailments are exceedingly uncommon. In the decade prior to CPUC's decision, approximately 75,000

trains passed through Site 9, carrying 314,070,000 gross tons of freight. R.E. 878. Yet there were only three derailments attributable to any cause. *Id.* Even when they occur, derailments are only rarely dangerous, because trains move very slowly (10-20 mph or less) on these mountain routes. R.E. 1077-78. The Dunsmuir accident was the *only* hazardous materials release of any kind between 1976-1997 anywhere in Site 9, R.E. 878, and it occurred only because a tank car fell 33 feet directly onto a rock—a very unlikely event. R.E. 164.

Finally, these issues also do not merit review because even if there *were* an essentially local hazard at Site 9 the CPUC's track structure rules are plainly not "necessary" to reduce or eliminate it. CPUC's 1997 Order directs Union Pacific to "preserve and maintain" certain 1983-84 "track structure strengthening" measures that (according to testimony given by a Southern Pacific employee) had reduced derailment accidents in Site 9. *See* Pet. 4 n.7; R.E. 439, 356-58. But it is undisputed that the 1983-84 Southern Pacific improvements *no longer exist*, because the track was comprehensively reconstructed by Union Pacific in 1997. R.E. 62. Post-1991 voluntary efforts by the railroad permanently decreased the grade at the Cantara Loop from 2.28 percent to less than one percent, and installed extremely strong and durable concrete ties throughout Site 9. R.E. 165, 879, 356-57. There were no derailments at all in Site 9 from 1992 to 1997. R.E. 878. CPUC could not make the reasoned finding of necessity required by § 20106 while refusing to consider the derailment data for the six years preceding the adoption of its rules, particularly in light of these significant structural alterations.

The district court held that CPUC's track safety standard was "necessary" only because "[t]here is no guarantee . . . that the necessary standards will always be voluntarily maintained either by UP or future operators."

Pet. App. B-42. But the FRSA requires proof that State regulation is in fact *necessary*, not just hypothetically beneficial. If a remote possibility that a safety hazard will develop in the future is enough to justify divergent State rules, the federal uniformity expressly sought by the FRSA will be entirely destroyed.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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